

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6600  
<http://www.montgomerycountymd.gov/boa/>**

**CASE NO. A-6616**

**PETITION OF JON EISING**

**OPINION OF THE BOARD  
(Opinion Adopted May 22, 2019)  
(Effective Date of Opinion: June 3, 2019)**

Case No. A-6616 is an application for a variance needed to allow construction of a swimming pool. The proposed construction requires a variance of five (5) feet, as it is within ten (10) feet of the left lot line. The required setback is fifteen (15) feet, in accordance with Section 59-4.4.5.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on May 15, 2019. Petitioner Jon Eising and his wife Christy appeared at the hearing in support of the application, assisted by Scott Seyfferth of Catalina Pool Builders. Abutting neighbors Phil and Gina McLaughlin appeared in opposition to the variance.

Decision of the Board:                      Variance **DENIED**.

**EVIDENCE PRESENTED**

1.     The subject property is Lot 23, Block A, Kings Valley Manor Subdivision, located at 24328 Red Blaze Drive, Damascus, MD, 20872 in the RE-2C Zone. It is a six-sided, flag-shaped lot, with an area of 25,010 square feet. See Exhibit 12.
2.     The Petitioner's original Statement of Justification ("Statement"), dated April 10, 2019, and signed by Victoria Kiser of Catalina Pool Builders, notes that the Petitioner is seeking a variance "to allow the construction that has already taken place for their residential swimming pool." This Statement indicates that the County approved all of the electrical and building inspections "until the final deck bonding inspection," and that if the requested variance is not approved, "there will be additional expenses for any needed construction and the bordering neighbors will also be inconvenienced." See Exhibit 3.
3.     The Petitioner's Supplemental Statement of Justification ("Supplemental Statement"), dated April 10, 2019, and signed by Scott Seyfferth of Catalina Pool Builders,

indicates that the variance requested is needed to “complete the nearly finished pool project.” The Supplemental Statement describes the events preceding the variance request as follows:

Montgomery County approved the building and electrical plans submitted for the pool project by Catalina Pool Builders and Lawson Electric. Catalina Pool Builder’s Building Permit was issued on July 2, 2018, and Lawson Electric’s Electrical Permit was issued on July 6, 2018. Throughout construction of the pool, there were multiple county inspections performed at specific phases of construction for both permits and all inspections were passed by the county. On March 29, 2019 during the deck bonding inspection, an inspection required after all previous inspections for the pool had passed; the county stopped all future work to complete the pool stating that a five foot variance was needed.

See Exhibit 10 (Supplemental Statement) and Exhibits 7(a)-(e) (issued permits). The Supplemental Statement goes on to say that the special circumstances or conditions “are not the result of actions by the applicant,” and that the requested variance “is the minimum necessary to be in compliance with what the county has now requested.” It further states that “[i]n granting the variance, there would be no substantial impairment to the intent and integrity of the general plan nor would the abutting property and other nearby properties be affected by the variance.” See Exhibit 10.

Finally, included with the Supplemental Statement is “a plan that shows a drainage swale that will divert water around the pool and towards the natural drainage relief area. The swale will be created upon the county’s acceptance of the variance.” See Exhibit 10. The drainage swale is shown as being three feet wide and one foot deep, located between the pool and the left side lot line. The elevation of the swale will drop approximately by 20.5 inches from south to north along the length of the pool area. See Exhibits 11(a)-(b).

4. The Petitioner submitted a new survey, done in May 2019, which shows the precise location of the pool, and indicates that the northwest corner of the pool is located 10.4 feet from the left (west) side lot line, and that the southwest corner of the pool is located 11.1 feet from that lot line. See Exhibit 12.

5. On the site plan submitted with the building permit originally approved by the County’s Department of Permitting Services (“DPS”), the pool appears to be located about ten (10) feet from the left side lot line, and laid out so that its length was essentially perpendicular to the left side lot line. See Exhibits 7(a) and 14(c). The new survey shows that the pool was actually constructed slightly more than ten (10) feet from the left side lot line, and that its orientation was changed so that its width is now perpendicular to the left side lot line, and its length is roughly parallel to that lot line. See Exhibit 12.

6. The record contains a letter of opposition, with attachments, from Phil and Gina McLaughlin, whose property abuts the subject property to the west, and is, per their letter, “the closest and most immediately affected” neighboring property. See Exhibit 15. The McLaughlins state that “[t]he pool, decking and retaining wall that have been constructed

are vastly different in design, layout and location from that which was approved in the permit issued by the Montgomery County Department of Permitting Services.” They note that the construction is also inconsistent with that approved by the Westview HOA, and that the HOA had issued a stop work order on February 7, 2019. See Exhibit 15.

The McLaughlins state in their letter that the construction of the pool on the subject property has had negative impacts on their property in a physical sense by interfering with the natural flow of stormwater and causing standing water on their property’s right side. They state that the construction has also negatively impacted their enjoyment of their property, noting that their once open backyard is now “crowded and closed in,” and that with the pool so close to the shared property line, they are concerned about “noise and lights which come naturally with the use of any pool.” See Exhibit 15.

The McLaughlins assert that “[t]here are no unique circumstances of [the subject] property that would prohibit construction of a pool within the Montgomery County zoning ordinance” and that “[c]learly there is more than enough space on the applicant’s property to build a pool without violating established setbacks.” They note in their letter that the subject property is over 25,000 square feet in size, over 103 feet wide, and has a backyard that is over 125 feet deep. They note that the site plan submitted with the approved building permit shows that there is over 53 feet of available space to the right side of the pool. See Exhibits 14(c) and 15. The McLaughlin’s letter states that nine (9) of the 36 homes in their subdivision have pools, and that all have been constructed in accordance with the Zoning Ordinance. They request that the variance be denied, and that the pool be rebuilt in compliance with the required setbacks.

7. The Petitioner submitted an email response to the McLaughlin’s letter of opposition. The Petitioner’s email indicates that the County has accepted their revised drainage plan. See Exhibits 11(a)-(b), 16, and 17. The Petitioner’s email goes on to further address the stormwater issue as follows:

My neighbors claim that the change in grading and raising of the applicants’ backyard to build the pool have interfered with the natural flow of storm water drainage through the backyards. I have video of this water flow taking roughly 99 percent out and around the pool. The only standing water is referenced in 4<sup>th</sup> pic of #12 of neighbors’ opposing letter. The first picture of number 12 was taken prior to the construction of the retaining wall and the excess dirt seen was filled in trenches dug to carry water to the water feature.

See Exhibit 17. With respect to his neighbors’ claim that violation of the 15-foot setback has altered the character and landscape of their property, the Petitioner’s email states that it is not the setback violation but rather R and D construction that altered the landscape. Finally, with respect to the McLaughlin’s future use and enjoyment of their property, the Petitioner’s email questions the difference that setting the pool an additional five (5) feet from the shared property line will make with respect to light and noise.

8. At the hearing, Petitioner Jon Eising testified that he and his wife are seeking a five (5) foot variance from the required side lot line setback for the construction of their pool. He testified that the plans for the pool that were originally approved by the County's Department of Permitting Services (DPS) showed a ten (10) foot setback from the side lot line, which is the setback at which the pool was constructed.<sup>1</sup> He stated that the orientation of the pool as constructed was flipped from the orientation shown in the plans approved by the County. Mr. Eising testified that he received a building permit denial from the County when he resubmitted the plans to show the change in orientation, and that he also received a denial from the homeowners' association, which stated that they followed the County. He testified that he has an email from DPS Manager James Sackett stating that the original permit approval was done by accident.

Mr. Eising addressed the drainage issues raised by the McLaughlins, testifying that the County has accepted a detailed drainage plan to address this issue, and that he has video showing that 99% of the water being taken out and around the pool. Mr. Eising also addressed the McLaughlins' claim that their property had been regraded by the Petitioner's contractor to their detriment, testifying that he had tried to work with the McLaughlins to remedy this, but that the McLaughlins refused to let his contractors make any changes to their property until after the variance hearing.

Mr. Eising testified that he and his wife are two teachers with two young children. He testified that it was not their intention to violate the setbacks or to hurt their neighbors' property. He testified that even if the pool were moved, the fence would still be located two (2) inches inside the property line. Mr. Eising testified that he and his wife have paid Catalina Pool Builders approximately \$90,000.

9. Scott Seyfferth of Catalina Pool Builders testified on behalf of the Petitioner. Mr. Seyfferth testified that the subject property slopes downward from the left side to the right side, and that the slope is more severe on one side. He estimated that the elevation drops 12 feet across the rear of the property.<sup>2</sup> He testified that they had tried to locate the pool in the area that was most level and that was at the highest elevation to allow for better drainage. He testified that the orientation of the pool was changed to keep the pool at this higher elevation and to decrease the grade that needed to be addressed during construction.

Mr. Seyfferth testified that the pool was constructed at the same ten (10) foot setback as had originally been approved by the County. He testified that the wall and fencing are in the location approved by the County, and that only the orientation of the pool had changed. He testified that despite the change in orientation, the "center" of the pool [presumably along the side lot line] is in the same location. Mr. Seyfferth testified that they did not request a revision to the building permit when they changed the orientation of the pool. Speaking generally, he testified that if the location of a pool is

---

<sup>1</sup> Mr. Eising testified later in the proceeding that his homeowners' association had also approved construction of this pool with a ten (10) foot setback from the side lot line.

<sup>2</sup> Abutting property owner Phil McLaughlin strongly disagreed with this estimate, stating that he believed the elevation change was about four (4) feet.

moved, they would always seek a revision to the permit, but if the shape of the pool is changed, a revision is not always done.

10. Phil McLaughlin, whose property abuts the subject property to the west (left), testified in opposition to the requested variance. Mr. McLaughlin noted that he and his wife had submitted a packet of materials substantiating their opposition. See Exhibit 15. He testified that they have lived in their home since 2013, and that the Petitioner's pool has not only physically impacted their property, but has an immeasurable long term impact. He testified that the pool adversely affects their ability to enjoy their home, and that they have a view of the pool from their deck. He testified that they now feel crowded and closed in.

Mr. McLaughlin testified that the Petitioner's request does not meet the requirements for the grant of a variance, and asked that the variance be denied. He testified that the subject property is similar to others in the subdivision, and has no unique characteristics. Mr. McLaughlin testified that there is ample space on the subject property to construct a pool that complies with the setbacks, and theorized that if the Petitioner has submitted a permit revision when the pool was reoriented, that DPS may have caught their original error and the need for a variance may have been averted. He testified that nine (9) of the 36 homes in the subdivision have pools, many with retaining walls. Mr. McLaughlin testified that the Petitioner is responsible for the current state of their pool.

Regarding drainage, Mr. McLaughlin testified that when construction on this pool began, there was no drainage plan, and that prior to the commencement of construction, water had never pooled on their property. He testified that in October, the Petitioner offered to regrade his property to fix the water problem. He testified that the drainage plan submitted in March did not accurately depict the wall or the water, and that the update to the drainage plan correctly showed the wall but not the water flow. He further indicated that the revised drainage plan indicated that his house was farther from the shared lot line than is actually the case, testifying that his house is located 18 feet from the side lot line.

11. Gina McLaughlin, who is married to Phil McLaughlin, also testified in opposition to the requested variance. Mrs. McLaughlin testified that the reorientation of the pool was Petitioner's preference, and not because of any unusual physicality of the property. She testified that contrary to the testimony which indicated that grading forced the reorientation of the pool, the Petitioner and his wife had told her that they wanted to be able to use their yard and keep their playground. Mrs. McLaughlin testified that she had spoken to a County specialist who told her that changing the orientation of the pool was not a minor change; she testified that the change in orientation affects other things. Mrs. McLaughlin testified that drainage travels down through the neighborhood to a stormwater management area.

Mrs. McLaughlin testified that the Petitioner and his wife have had ample time to address the proximity of the pool to the side lot line. She testified that when they told her that they had permits to construct the pool, she had no reason to doubt that the permits were issued correctly. Mrs. McLaughlin testified that when representatives of the homeowners' association came out to the property, they said that would "never" have approved the existing construction.

## CONCLUSIONS OF LAW

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals must find that:

(1) denying the variance would result in no reasonable use of the property; or

(2) each of the following apply:

a. one or more of the following unusual or extraordinary situations or conditions exist:

i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

ii. the proposed development uses an existing legal nonconforming property or structure;

iii. the proposed development contains environmentally sensitive features or buffers;

iv. the proposed development contains a historically significant property or structure; or

v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;

b. the special circumstances or conditions are not the result of actions by the applicant;

c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;

d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and

e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

2. The Board notes, based on the record in this case, that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59-7.3.2.E.2 of the Zoning Ordinance. Section 59-7.3.2.E.2 sets forth a five-part, conjunctive ("and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

Based on the testimony and evidence of record, the Board finds that the variance to permit the proposed construction of a pool ten (10) feet from the side lot line, requiring a variance of five (5) feet from the otherwise applicable fifteen (15) foot setback, fails to meet Section 59-7.3.2.E.2.a, and/or Section 59-7.3.2.E.c, and accordingly must be denied.

In support of this denial, the Board finds that despite discussion of grading and drainage, and of previous County approvals, the Petitioner has not demonstrated that the subject property itself has any unusual or extraordinary situations or conditions for the purposes of meeting Section 59-7.3.2.E.2.a.i that would prevent the location of the pool in compliance with the required side lot line setback. Indeed, the Board notes that the surveyed plat in the record at Exhibit 12 shows ample room on this 25,010 square foot property to locate the proposed pool the required fifteen feet from the side lot line. While Mr. Seyfferth did testify that the location and orientation of the pool were selected to take advantage of the property's elevation and relatively flat topography in that area, the Board notes that the record does not contain a topographical map of the property, and that Mr. Seyfferth's estimate of the elevation change across the rear of this property differed significantly from that of Mr. McLaughlin (12 foot change versus four (4) foot change). In addition, the Board finds that the record lacks any evidence to show that the slope of the subject property is different or unique from that of surrounding properties. Finally, the Board notes that Mr. McLaughlin testified that many of the pools in the neighborhood had been constructed with retaining walls, and finds that the record contains no evidence to suggest that this could not have been done on the subject property.

With respect to the remaining ways in which to satisfy Section 59-7.3.2.E.2.a of the Zoning Ordinance (i.e., Sections 59-7.3.2.E.2.a.ii – v), the Board finds that the Petitioner has not argued that his property meets any of these tests, choosing instead to assert that the County's initial issuance of a building permit for a pool with a ten (10) foot side setback, and other subsequent County approvals, are grounds for the grant of the requested variance. While the Board is sympathetic to this argument, the Board notes that the pool was not constructed in accordance with the permit that was issued, and further finds that the County's erroneous issuance of a building permit cannot be grounds for the grant of the requested variance.<sup>3</sup>

Finally, the Board recognizes that the Petitioner has testified that he has already spent considerable money on this pool, and that per Exhibit 3, moving the pool will entail additional expense. The Board notes that financial hardship is not a sufficient reason to

---

<sup>3</sup> See *Cromwell v. Ward*, 102 Md. App. 691, 725 (1995) ("Accordingly, it appears clear that the mistake of a county official cannot be the 'practical difficulty' unique to the subject property in order to authorize the grant of the variance sought and obtained by Ward."). The Board notes that under the County Zoning Ordinance, an applicant must show that the property is unique (Section 59-7.3.2.E.2.a) and that the strict application of the Zoning Ordinance would cause the applicant a practical difficulty (Section 59-7.3.2.E.2.c). It is not clear from Exhibits 3 and 10 whether the Petitioner is asserting that the issuance of County permits makes his property unique, or whether he is asserting that it causes him a practical difficulty in complying with the Zoning Ordinance. In either event, the Board finds that the erroneous issuance of a County permit is not grounds for the grant of the requested variance.

justify the grant of a variance, and that the Petitioner has not shown that if the variance is not granted, it will be impossible for him to secure a reasonable return from or make reasonable use of his property.<sup>4</sup>


Having found that the application fails to meet Section 59-7.3.2.E.2.a of the Zoning Ordinance, and to the extent that the Petitioner was asserting that the County's erroneous issuance of the original building permit with a ten (10) foot setback constituted a practical difficulty, Section 59-7.3.2.E.2.c, the Board finds that it need not address the remaining variance criteria, and that the variance must be denied.

On a motion by Katherine Freeman, seconded by John H. Pentecost, Chair, with Stanley B. Boyd, Vice Chair, Bruce Goldensohn, and Jon W. Cook in agreement, the Board voted to deny the requested variance, and adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

  
\_\_\_\_\_  
John H. Pentecost, Chair  
Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 3rd day of June, 2019.

  
\_\_\_\_\_  
Barbara Jay  
Executive Director

---

<sup>4</sup> See *Montgomery County, MD v. Frances Rotwein*, 169 Md. App. 716, 732-33 (2006) ("Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, 102 Md. App. at 715 (quoting *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984)). Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715. Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198 (1957). But Rotwein has not demonstrated that, unless her application is granted, it will be "impossible [for her] to make reasonable use of her property." *Id.*).



**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.